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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

78-20

October Term, 1972

MARK B. ARONSON and KENNETH W. BEHREND on behalf of themselves and all others similarly situated,
Petitioners,

vs.

DANIEL W. AMBROSE, Chairman of the District Court of the Virgin Islands Committee of Bar Examiners and RICHARD E. GRUNERT, VINCENT A. GAMAL, WINSTON A. HODGE, and ROGER L. CAMPBELL, members of the Committee of Bar Examiners of the District Court of the Virgin Islands.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARK B. ARONSON,
KENNETH W. BEHREND,
BEHREND AND ARONSON,
Petitioners pro se and Attorneys.

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Pittsburgh, Pa. 15219.

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IN THE

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MARK B. ARONSON and KENNETH W. BEHREND on behalf of themselves and all others similarly situated,
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vs.

DANIEL W. AMBROSE, Chairman of the District Court of the Virgin Islands Committee of Bar Examiners and RICHARD E. GRUNERT, VINCENT A. GAMAL, WINSTON A. HODGE, and ROGER L. CAMPBELL, members of the Committee of Bar Examiners of the District Court of the Virgin Islands.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Mark B. Aronson and Kenneth W. Behrend, pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled civil action on May 22, 1973.

Reference to Reports of Opinions Delivered in the Courts Below

The opinion of Judge Maris of the United States Court of Appeals for the Third Circuit, filed May 22, 1973, and not yet reported, is reprinted in the Appendix hereto

p. A-1, *infra*. The opinion of Chief Judge Christian of the District Court of the Virgin Islands filed April 17, 1972, upon which judgment was entered in that Court on May 16, 1972, is included in the appendix to the appeal to the United States Court of Appeals for the Third Circuit which is being certified to this Court.

Jurisdiction

Petitioners sought a declaratory judgment and injunctive relief in the District Court of the Virgin Islands to restrain the Committee of Bar Examiners from denying them admission to the Bar of that Court. Upon dismissal of the complaint, petitioners appealed to the United States Court of Appeals for the Third Circuit. This was the first time that a Court of Appeals had been asked to consider the constitutionality of residency and bar examination requirements as applied to practicing lawyers and the first time that the rules of court challenged were those of a Federal Court. The Constitutional rights to due process of law and to equal protection of the laws have been extended to the Virgin Islands by section 3 of the Revised Organic Act. 48 U. S. C. § 1561. The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Is there any reason why an attorney at law may not be engaged in the general practice of law in more than one state or territory?

2. Should the Committee of Bar Examiners of the District Court of the Virgin Islands be directed to certify Mark B. Aronson and Kenneth W. Behrend for Admission to the Bar of that Court?

3. Is Rule 56 b (4) of the District Court of the Virgin Islands unconstitutional as imposing a burden on the right to interstate travel without being necessary to promote a compelling local interest and does it deny to applicants equal protection of law in requiring applicants for admission to the Bar of that Court to have resided in the Virgin Islands for at least one year immediately preceding their proposed admission to the Bar of that Court?

4. Is Rule 56 b (5) of the District Court of the Virgin Islands unconstitutional as imposing a burden on the right to travel without being necessary to promote a compelling local interest and does it deny to applicant's equal protection of law in requiring applicants for admission to the Bar of that Court to allege and prove to the satisfaction of the Bar Examining Committee that if admitted, they intend permanently to reside in and to practice law in the Virgin Islands?

5. What is the purpose of Rule 56 b (5)?

6. If Rule 56 b (5) of the Rules of the District Court of the Virgin Islands does not serve any purpose not already served by other less restrictive rules of that Court, and if application of Rule 56 b (5) affectively prevents petitioners from practicing their profession in the Virgin Islands, and if Rule 56 b (5) on its face is inconsistent and in conflict with other rules of the same Court, must Rule 56 b (5) fail as being without merit and as being the way of greatest interference with constitutionally perfected activity (Dunn vs. Blumstein, 401 U. S. 934, 1972)?

7. Is Rule 56 d of the District Court of the Virgin Islands discriminatory and unconstitutional in requiring all applicants for admission to the Bar of that Court to successfully pass a written Bar Examination except those domiciliaries of the Virgin Islands who had passed such an examination in the place where they studied law?

Constitutional Provision Involved

AMENDMENT XIV, SECTION 1

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws."

Rules of the District Court of the Virgin Islands Involved

Rule 56 (b) (4)—"Each applicant . . . must allege and prove to the satisfaction of the Committee that he shall have resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar."

Rule 56 (b) (5)—"Each applicant . . . must allege and prove to the satisfaction of the Committee that if admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands."

Rule 56 (d)—"All applicants for admission to the Virgin Islands Bar shall take a written bar examination as prescribed in paragraph (a) of this rule, as amended, and shall be eligible for admission, being otherwise qualified, upon the successful completion of the said examination: PROVIDED, HOWEVER, that an inhabitant of the Virgin Islands, who was domiciled therein at the time he commenced his law studies, and who continues to be domiciled in the Virgin Islands up to the time of the filing of an application for admission to the Virgin Islands Bar, shall have satisfied the requirement of the taking of the required written examination if he has passed the written bar examination of the District of Columbia, or the State or Territory of the United States in which the law school from which the said applicant graduated is located . . ."

Statement of the Case

Petitioners are attorneys admitted to practice in the Court of Pennsylvania and in the federal courts. They intended to engage in the general practice of law in the Virgin Islands where they would have opened an adequately staffed law office. Petitioners would be residents of both the Virgin Islands and Pennsylvania but they would remain domiciled in Pennsylvania.

Each petitioner filed with the Clerk of the District Court of the Virgin Islands an application for admission to the Bar of that Court. The Committee of Bar Examiners refused to certify petitioners for admission for three reasons:

1. The application did not allege that petitioners will have resided in the Virgin Islands for at least one year prior to admission.
2. The applications did not allege that if admitted, petitioners intended to continue to reside and to practice law permanently in the Virgin Islands.
3. Petitioners had not passed the Virgin Islands Bar Examination.

At the time that petitioners filed their applications for admission they requested to be treated the same as domiciliaries of the Virgin Islands—petitioners sought to be excused from the Bar Examination. The record shows that petitioners were qualified to practice law in the Virgin Islands. In fact, they had appeared specially on several occasions. At no time has the moral or ethical qualifications of the petitioners been challenged. The District Court, in admitting them specially on several occasions,

and the Committee of Bar Examiners in their pleadings, have admitted that petitioners qualify in every particular except that each petitioner has a residence in Pennsylvania which he intends to keep. After being turned down by the Committee of Bar Examiners, petitioners filed suit in the District Court seeking admission to the Bar of the District Court. Several months after petitioners' complaint was filed, but before the Committee of Bar Examiners filed their answer, the District Court amended its rules to require all applicants to take a Bar Examination.

The basis for federal jurisdiction in the District Court of the Virgin Islands, cited in the Complaint as amended, is 28 U. S. C. 1343 (3) and (4), 28 U. S. C. 2201, and 48 U. S. C. 1612. The District Court of the Virgin Islands is a territorial court and not a United States District Court as defined in 28 U. S. C. 451, Stainback vs. Mo Hock Ke Lok Po, 1949, 336 U. S. 368. Accordingly, the claim was heard before a one judge court. Similar issues raised in federal court in other judicial districts throughout the United States have all been heard by three-judge courts.

Petitioners Argument for Allowance of the Writ

The Supreme Court of the United States should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit because the Court of Appeals has rendered a decision which acknowledges a conflict among three-judge District Courts. (See footnote 4, p. A-7, *infra.*) The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this court. While this court has recognized the national importance of the rights of attorneys to practice their profession (Schware vs. Bar Examiners, 353 U. S. 232, 77 S. Ct. 752 (1957), Martin vs. Walton, 368 U. S. 25

(1969), and *In Re* Application of Fre Le Pol Griffith for Admission to the Bar (recently argued before the Court in its October Term, 1972, at No. 71-1336, opinion not yet reported)), this court has not settled the questions cited above. In addition, the Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court. This decision, the first one from a Court of Appeals in this area of the law, becomes the law of the land. This decision is a bad decision; it is bad law. Yet it may control and concern members of every state licensed profession in America. Martin vs. Walton, *supra*, upon which the Court of Appeals apparently relied, is outdated and should be reconsidered. The Court of Appeals has ignored that we now live in the jet age. It has created a false distinction between a lawyer from one state being admitted specically in another state, who is subject to all of the rules and regulations imposed upon attorneys in said other state, and between attorneys desiring to practice full time in more than one state.

It is important for this court to determine what residency requirements, if any, prior to admission and after admission, are proper for licensed professions.

Rule 56 b (4)

The Court of Appeals by-passed the issue whether a one-year residency requirement in the Virgin Islands is constitutionally permissible. Footnote 4 to the opinion acknowledges that most three-judge district courts have rejected such residency requirements as being repugnant to the Fourteenth Amendment while a divided three-judge court for the district of New Mexico upheld a six month waiting period.

Rule 56 b (5)

The Court of Appeals upheld the validity of a rule of court requiring a declaration at the time of application for admission of permanent residency after admission. The requirement of permanent residency is unconscionable. It prohibits a member of the bar of the District Court of the Virgin Islands from moving elsewhere without forfeiting his right to remain an active member of the bar.

This court in 1972 held that residency laws must be measured by a strict equal protection test and they are unconstitutional unless the state or territory can demonstrate that such laws are necessary to promote a compelling governmental interest. A heavy burden of justification for the law is on the state. A statute should be closely scrutinized in light of its asserted purposes and if there are other reasonable ways to achieve the goals of the state or territory with a lesser burden on constitutionally perfected activity, a state or territory may not chose the way of greater interference. If it acts at all, it must chose less drastic means. Dunn vs. Blumstein, *supra*, 401 U. S. 934.

Chief Judge Christian of the District Court of the Virgin Islands cited reasons for the requirement of his court for an applicant to declare a present intention to reside permanently exclusively in the Virgin Islands, and the Court of Appeals affirmed. Identical reasons were considered and rejected, however, in Potts vs. Honorable Justices of the Supreme Court of Hawaii, D. C. Hawaii, 1971, 332 F. 2nd 1392. The characteristics of Hawaii and the Virgin Islands are quite similar in that both are off the mainland, neither has a law school, and both have their own local customs.

The requirement for an applicant to declare a present intention to remain forever in the Virgin Islands, once admitted to practice, is unreasonable and does not serve any meritorious purpose. The District Court of the Virgin Islands by Rule 57(d) has inherent disciplinary power over all attorneys practicing at the bar, no matter where they are domiciled. The doctrine of Dunn vs. Blumstein, *supra*, § C, thus invalidates Rule 56 b (5) and makes it constitutionally offensive.

Rules 56 b (5) and 57 serve the same purpose: both rules are geared to protect the local interest of the bench, bar, and public in the Virgin Islands. The Court of Appeals apparently in reliance upon Martin vs. Walton, 1961, 368 U. S. 25, upheld the constitutional validity of Rule 56 b (5), a much harsher and unnecessary rule, serving no purpose not already served by Rule 57. Following Dunn vs. Blumstein, *supra*, the Court of Appeals should have rejected Rule 56 b (5) in favor of Rule 57.

Cannon 33 of the cannons of practice of the American Bar Association supports petitioners' petition. The American Bar Association has recognized that an attorney can have offices both in the Virgin Islands and in New York State. Virgin Islands Bar Association vs. Dench, 215 F. 2d 810 (Third Circuit, 1954). The District Court of the Virgin Islands by its Rule 57, has adopted the cannons of practice of the American Bar Association. Cannon 33 is clearly inconsistent with Rule 56 b (5), as is the American Bar Association Code of Professional Responsibility. Rule 56 b (5) clearly serves no merit. Rule 56 b (5) is the reason cited by the Committee of Bar Examiners, however, for refusing to certify petitioners' applications for admission the Bar of that Court.

Rule 56 d

Rule 56 d in effect at the time petitioners applied for admission to the bar discriminated against them as non-domiciliaries of the Virgin Islands. Rule 56 d required non-domiciliaries of the Virgin Islands to take and pass the bar examination while excluding all other persons. Petitioners are the only persons in the world who have been discriminated against in this instance. Benign racial classification is not constitutionally permissible if in granting special treatment to minorities it takes away constitutionally guaranteed rights of non-minority persons in violation of the due process and equal protection clauses of the United States Constitution. The Court of Appeals did not consider whether this rule was unconstitutional as applied to petitioners. Chief Judge Christian in footnote 5 referred to "constitutional problems" with the rule, but he and the Court of Appeals by-passed the issue by upholding Rule 56 b (5).

For all of the reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court

(Filed May 22, 1973.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1472

MARK B. ARONSON and KENNETH W. BEHREND, on behalf of themselves and all others similarly situated,

Appellants,

v.

DANIEL W. AMBROSE, Chairman of the District Court of the Virgin Islands Committee of Bar Examiners and RICHARD E. GRUNERT, VINCENT A. GAMAL, WINSTON A. HODGE, and ROGER L. CAMPBELL, members of the Committee of Bar Examiners of the District Court of the Virgin Islands.

(D. C. Civil No. 326-1971)

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Argued at Christiansted February 1, 1973.

Before MARIS, ROSENN and HUNTER, *Circuit Judges.*

Mark B. Aronson, Esq., Appellant, *pro se.*
Vincent A. Gamal, Esq., Appellee, *pro se.*

MARIS, *Circuit Judge.*

This case involves the question of the constitutional validity of Rule 56(b)(5) of the Rules of the District Court of the Virgin Islands which requires an applicant for admission to the Virgin Islands bar to allege and prove that if admitted he intends to reside in and to practice law in the Virgin Islands. The validity of Rule 56(b)(4) which requires at least one year's residence before admission to the Virgin Islands bar and of Rule 56(d) which requires applicants for admission of the Virgin Islands bar to take a written examination, are also attacked. The pertinent provisions of Rule 56 are set out in the margin.[1]

The controversy arises out of the following facts. The plaintiffs, both members of the Pennsylvania bar, filed applications for admission to the bar of the Virgin Islands.

---

[1] "Rule 56. Admission to the Bar

. . .

(b) Each applicant for examination under the preceding section must file an application with the Committee of Bar Examiners at least sixty days prior to the date prescribed for annual examination as above, in which he must allege and prove to the satisfaction of the Committee that:

. . .

(4) He shall have resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar; and

(5) If admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands;

. . .

(4) All applicants for admission to the Virgin Islands Bar shall take the written bar examination as prescribed in paragraph (a) of this rule, as amended, and shall be eligible for admission, being otherwise qualified, upon the successful completion of the said examination." 5 V.I.C. App. V.

They each stated, *inter alia,* that they were Pennsylvania residents and intended to practice law in the Virgin Islands. The defendants, comprising the Virgin Islands Committee of Bar Examiners, informed each plaintiff by letter that the committee was unable to recommend his admission to the Virgin Islands bar for the reasons that he had not passed the Virgin Islands bar examination, that his application did not allege that he will have resided in the Virgin Islands for at least one year prior to admission to the Virgin Islands bar, and that his application did not state that, if admitted, he intended to continue to reside in the Virgin Islands, in accordance with the requirements of subdivisions (b)(4), (b)(5) and (d) of Rule 56. Thereupon, the plaintiffs, alleging violation of their constitutional rights under the Fourteenth Amendment, brought suit[2] in the District ourt of the Virgin Islands for an injunction to restrain the defendants from enforcing against them these provisions of the rules governing the admission of applicants to the Virgin Islands bar and sought an order from the court directing the committee to certify them for admission to practice law in the Virgin Islands. The case was tried by Chief Judge Christian, who rejected the plain-

[2] The suit was instituted under the Civil Rights Act, 42 U.S.C. § 1983, and the plaintiffs requested a hearing before a three-judge court pursuant to 28 U.S.C. § 2281. However, that section does not authorize the convening of a three-judge court in the District Court of the Virgin Islands, since it is a territorial court and not a United States district court as defined in 28 U.S.C. § 451. *Stainback v. Mo Hock Ke Lok Po,* 1949, 336 U.S. 368. Accordingly, the case was tried by one judge in the district court.

The constitutional rights to due process of law and to equal protection of the laws have been extended to the Virgin Islands by Section 3 of the Revised Organic Act, 48 U.S.C.A. § 1561.

tiffs' contentions and dismissed the complaint, *Aronson, et al v. Ambrose, et al.*, 1972, ____ V.I. ____, ____ F. Supp. ____. This appeal by the plaintiffs followed.

The plaintiffs' principal contention, and the only one we need consider, is that Rule 56(b)(5) is unconstitutional in requiring an applicant for admission to the Virgin Islands bar to allege and prove that if admitted he intends to reside, as well as practice, in the Virgin Islands. They say that although they intend to practice law in the territory they do not intend to give up their residence or practice in Pennsylvania and that the district court errred in holding that the residence requirement of Rule 56(b)(5) did not deny them equal protection of the laws or invade their constitutional right to engage in interstate travel. In his opinion in the district court Chief Judge Christian discusses this question at length. He there describes the problems of judicial administration which would arise in his court if nonresident attorneys were to be admitted to general practice therein, problems with which he obviously is far more familiar than we can be. We find ourselves completely in accord with the views expressed and conclusions reached in his opinion and need add but a few comments.

The interest of a state or territory in promoting the speedy and efficient administration of justice in its courts by assuring the competence and discipline of its bar is great and the actions of its legislature and courts toward these ends ought not to be interfered with except with the greatest caution and only if the measure in question is clearly constitutionally impermissible. The requirement that a lawyer must reside in the state in order to practice law there is widely recognized as an appropriate measure

to promote the state concern for the proper administration of justice and is in force in most jurisdictions.[3] As Chief Judge Christian pointed out in his opinion those reasons are applicable to the Virgin Islands. Indeed they are even more compelling in that territory because of its geographic isolation from the continental United States. For as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines. The case load of the district court is continually increasing and it would be intolerable if the court were to be compelled to depend, even in part, on lawyers living and practicing law on the mainland more than a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

In *Martin v. Walton*, 1961, 368 U. S. 25, the Supreme Court had before it an appeal from the Supreme Court of of Kansas [*Martin v. Davis*, 1960, 187 Kan. 473, 357 P. 2d 782] which had upheld a rule of the court requiring an attorney regularly practicing in another state to associate with himself a member of the Kansas bar when practicing in Kansas. The Court dismissed the appeal for want of a substantial federal question, saying:

> "Upon plenary consideration, we are satisfied that, both on their face and as applied to appellant, Kan. Gen. Stat., 1949, § 7-104, and amended Kan. Sup. Ct. Rules 41 and 54 promulgated by the Supreme Court of Kansas, acting within its conpetence upon state law, are not beyond the allowable range of state action under the Fourteenth Amendment. . . . We cannot disregard the reasons given by the Kansas Supreme

[3] See Am. Jur. 2d Desk Book, Document No. 93.

> Court for the Rules in question. . . . Nor does the fact that the Rules may result in 'incidental individual inequality' make them offensive to the Fourteenth Amendment. . . ."

The appellant was licensed to practice in Missouri and Kansas and was actually a resident of Kansas. He was, nonetheless, required to associate himself with a locally practicing Kansas attorney when appearing in the Kansas courts, because he was regularly practicing law in Missouri, outside the State of Kansas. We think, as the Supreme Court of Virginia said in *Application of Titus*, 1972, 213 Va. 289, 191 S. E. 2d 798, 801:

> "The importance of the *Martin* case to the question before us is this: If a state may constitutionally deny an attorney who is a resident and licensed in that state the right to appear in its courts without local counsel because he regularly practices elsewhere, it surely can deny, as many states do, nonresident attorneys the right to appear *pro hac vice* without local counsel. And, by the same token, a state also should be able validly to deny a nonresident attorney the right to practice generally unless he agrees to become a resident upon admission. There is no difference in principle between denying a nonresident attorney the right to appear on a case-to-case basis from denying another nonresident attorney the right to practice generally."

The *Martin* case thus furnishes ample support for the action of the district court in holding that the residence requirement with which we are concerned does not run afoul of constitutional limitations. In the *Titus* case, *supra*, the Supreme Court of Virginia held constitutionally valid a rule of court which requires a nonresident lawyer who desires to practice in Virginia to become a permanent resident of that state before he may be admitted to practice

there. We are in full accord with the views on this question which the court expressed in that case and which are fully applicable to the case now before us. We are satisfied that Rule 54(b)(5) does not deny the plaintiffs the equal protection of the laws. We are equally satisfied, for the reasons adequately stated in Chief Judge Christian's opinion, that it does not impair their right to engage in interstate travel.

The plaintiffs also urge the invalidity of Rule 56(b)(4) which requires an applicant to reside in the Virgin Islands for at least one year preceding his proposed admission to the Virgin Islands bar and of Rule 56(d), as it existed in May 1971 when their applications were filed, which then required every applicant for admission to the bar to pass a written bar examination except those domiciliaries of the Virgin Islands who had passed such an examination in the place where they studied law. However, in view of the plaintiffs' definite position that they intend to retain their residence in Pennsylvania after admission, which was a sufficient ground under Rule 56(b)(5) for refusing their applications, we need not consider these contentions.[4]

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[4] We merely note, with respect to Rule 56(b)(4), that the courts are divided as to the constitutional validity of pre-admission residence requirements. Compare *Keenan v. Board of Law Examiners of the State of North Carolina*, D.C.N.C. 1970, 317 F. Supp. 1350; *Webster v. Wofford*, D.C.Ga. 1970, 321 F. Supp. 1259; *Litman v. Van Zant*, D.C.Miss. 1971, 329 F. Supp. 391; and *Potts v. Honorable Justices of the Supreme Court of Hawaii*, D.C. Hawaii 1971, 332 F.2d 1392; with *Suffing v. Boudurant*, D.C.N.M. 1972, 339 F.2d 257.

(D. C. Civil Action No. 326-1971.)

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN.

Present:

MARIS, ROSENN and HUNTER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 16, 1972, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

THOMAS P. QUINN,
Clerk.

May 22, 1973.